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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. LINNTON PLYWOOD ASSOCIATION, Defendant.	Civil Action No. 3:14-01772-ST **REPLY BRIEF**

UNITED STATES' REPLY BRIEF IN SUPPORT OF ITS MOTION TO ENTER AMENDED CONSENT DECREE

INTRODUCTION

The United States files this reply brief in support of its Motion to Enter the Amended Consent Decree with Linnton Plywood Association ("LPA"), responding to the Objections filed by BAE/TMG and Schnitzer, et al. The principal objection is that the United States' settlement will cut off contribution rights of the other responsible parties leaving them unable to pursue claims against LPA involving a corpus of money associated with the Weiss judgment. They also complain that the settlement is silent on EPA's future use of any money collected even though any such use would be lawful and consistent with the goals of CERCLA. The only other parties that initially objected to entry of the Amended Consent Decree, on largely the same grounds, the Arkema Plaintiffs,[1] have now reached a settlement (the "Arkema Settlement") with LPA that resolves their contribution claims in Arkema v. Anderson Roofing, Case No. 3:09-CV-453-PK (D. Oregon 2009), and their objections to entry of the Amended Consent Decree in this case. Especially in light of the Arkema Settlement, the Court should approve the Amended Consent Decree notwithstanding the remaining objections of BAE/TMG and Schnitzer Steel Industries (the "Objectors").

ARGUMENT

I. The Arkema Settlement Has Resolved the Arkema Plaintiffs' Objections to Entry of the Amended Consent Decree and Benefits All PRPs.

Of the original objecting parties, the Arkema Plaintiffs have spent by far the most money on response actions at the Portland Harbor Superfund Site (the "Site"). Indeed, they allege that they have spent in excess of $100 million implementing the Administrative Settlement and Order on Consent with EPA to perform the Remedial Investigation and Feasibility Study ("RI/FS

[1] This group includes Arkema, Inc., Chevron U.S.A., Inc., the City of Portland, ConocoPhillips Company, Evraz, Inc. NA, Gunderson LLC, NW Natural, TOC Holdings Co.,Union Pacific Railroad Company, and the Port of Portland.

AOC"). Dkt. 52 at 6. Following the filing of the objections to the United States' Motion to Enter the Amended Consent Decree, LPA and the Arkema Plaintiffs engaged in settlement negotiations, with the encouragement of the United States, in an effort to resolve the Arkema Plaintiffs' claims for contribution against LPA in the Arkema case and objections to entry of the Amended Consent Decree in this case. At the United States' urging, LPA and the Arkema Plaintiffs invited the remaining Objectors to resolve their objections through the same settlement. While those efforts were ultimately unsuccessful,[2] the Arkema Settlement indirectly benefits all potentially responsible parties ("PRPs") at the Site (including the Objectors), and will, by making funding available from the Remediation Escrow Account, directly benefit any party that performs response actions at the Site pursuant to a consent decree with the United States that implements EPA's ultimate cleanup decision. At the same time, it does not reduce the United States' recovery under the Amended Consent Decree. From the beginning of negotiations, the United States' consent to the Arkema Settlement was conditioned on these two factors. As required by the Arkema Settlement, if the Court enters the Amended Consent Decree, LPA will pay $500,000 of the funds that it would otherwise have paid to the Weiss Judgment Plaintiffs instead into a Remediation Escrow Account set up by the Arkema Plaintiffs. This payment into the Remediation Escrow Account will effectively limit LPA's payments to the Weiss Judgment Plaintiffs to $2.6 million, rather than the original $3.1 million, leaving the United States' recovery under the definition of Net Proceeds in the Amended Consent Decree unchanged.[3] See **[NEW]**Net Proceeds Analysis **ATTACH as Ex. 22.** In turn, the Remediation Escrow Account

[2] The Objectors sought concessions from the United States that, in the United States' view, would improperly restrict EPA's lawful authority regarding the use of Superfund money.

[3] For this reason, it is not necessary to amend the definition of Net Proceeds in the Amended Consent Decree. The only purpose of doing so would be to avoid the possibility that LPA could perceive itself to be subject to conflicting obligations. The United States represents that it has consulted with LPA and LPA consents to the description of its obligations set forth in this paragraph and footnote.

provides that funds be disbursed to reimburse any party who performs response actions implementing EPA's future Record of Decision at the Site pursuant to a consent decree with the United States.[4] Because the Arkema Settlement does not reduce the United States' recovery under the Amended Consent Decree and provides additional funding for response actions at the Site, the United States consents to the Arkema Settlement.

II. The Amended Consent Decree is Fair, Reasonable, and in the Public Interest.

A. The Retention of EPA's Authorities Regarding the Use of Superfund Monies is Fair and Reasonable

The fact that the Amended Consent Decree preserves EPA's authority to use settlement proceeds to conduct or finance response actions, including its own response actions (which include overseeing work conducted by PRPs),[5] or transfer funds to the general Superfund is, notwithstanding the Objectors' claims, Dkt. 46 at 2-6, Dkt. 48 at 3-5, not "unfair" or "unreasonable." Indeed, the Objectors' demand that this Court forbid EPA from taking lawful action, by disapproving the Amended Consent Decree, is itself unreasonable.

EPA's decisions regarding 1) whether to use any settlement recoveries to fund future work by private parties, and 2) whether and how to use any settlement recoveries for purposes of carrying out superfund settlements, are judicially unreviewable and subject to EPA's discretion "notwithstanding any other provision of law." See 42 U.S.C. § 9622(b)(2), (3). The Objectors cannot obtain indirectly, via this Court's review of the Amended Consent Decree, what the statute forbids directly. Therefore, the Court should disregard the Objectors' claims that it is

[4] If no party enters into such a consent decree within 24 months of issuance of the Record of Decision, the escrow funds may be disbursed to the Arkema Plaintiffs to partially reimburse the more than $100 million they allege they have already spent implementing the RI/FS AOC.

[5] To date, all of the agreements EPA has entered into that require PRPs to perform work at the Site include the requirement that those PRPs reimburse EPA's oversight costs incurred in overseeing that work. Thus, EPA does not now have, and does not anticipate having, any unreimbursed oversight costs prior to the issuance of the ROD. Thus, as noted in the United States' Motion to Enter, as with many of their concerns regarding the use of settlement proceeds, the Objectors to some extent raise hypothetical issues that may never come to pass. See Dkt. 33 at 20.

either unfair or unreasonable for EPA to retain the right to use settlement proceeds for its own response costs, Dkt. 46 at 6-7, Dkt. 48 at 3-5, to refuse to commit to using settlement proceeds to fund future work solely by PRPs, Dkt. 46 at 5-6, Dkt. 48 at 4-5, or to refuse to relinquish its authority to revert funds to the larger Superfund (of which the site-specific account for Portland Harbor is a part), Dkt. 46 at at 3-5.

Objectors' argument that EPA should be required in this consent decree to commit the use of settlement proceeds to future work only is misplaced. First, regardless of how EPA uses such funds, the total liability of the remaining PRPs for response costs at the Site will be reduced by the amount of the settlement, thereby benefitting all PRPs. 42 U.S.C. § 9613(f)(2).

Second, any funds EPA spends at the Site, whether from the site-specific Special Account or from the general Superfund, will increase the total amount of EPA's costs at the Site. Likewise, any funds recovered by a settlement "reimburse" EPA's site costs, whether they are placed in the site-specific Special Account or in the general Superfund. Thus, whether EPA uses settlement proceeds for response actions at the Site, or transfers them to the Superfund and uses non-site-specific Superfund money for response actions at the Site, EPA's unreimbursed costs will be the same.

Third, Objectors' argument threatening EPA's ability to negotiate for future performance of the remedy at the Site unless there is sufficient "Orphan Share" funding is meritless. Dkt. 46 at 3, 5-6. It is relevant that these Objectors have never agreed to do work at this Site, either prospectively with regard to the yet-to-be-selected remedy, or in the past with respect to the RI/FS AOC. In contrast, the only parties that have, thus far, voluntarily performed response actions at the Site by agreement with EPA, the Arkema Plaintiffs, have withdrawn their objections to the settlement. Moreover, the fact that the Arkema Plaintiffs were able to resolve

their claims via the Arkema Settlement in the context of this Amended Consent Decree makes clear that the potential difficulties the Objectors posit regarding future negotiations are, at best, illusory. Indeed, in addition to whatever settlement proceeds remain in the Special Account for the Site, there will now also be $500,000 set aside in the Remediation Escrow Account for use by future performing parties, if any, due to the Arkema Settlement. Thus, if anything, the fairness, reasonableness, and public interest nature of the Amended Consent Decree is greater now than it was upon lodging.

Finally, the United States reiterates that EPA Region 10 intends to dedicate proceeds received from this settlement to conduct or finance response actions at the Site taken after the date of entry of the Amended Consent Decree. If EPA is able to enter into a settlement with one or more parties who agree to implement the Record of Decision, EPA intends to make such disbursements as agreed to by EPA and such parties from any remaining settlement proceeds to perform work required under the settlement. Indeed, as set forth in the Motion to Enter, EPA Region 10 is already aware that it faces substantial costs in the immediate future for the drafting, issuance, and finalization of the Record of Decision. See Dkt. 33 at 4. It would make little sense for the Region not to use available money in the Special Account for these purposes (unless they are reimbursed by other means), especially given the potential risks and delays of attempting to obtain such funds from the Superfund's general budget. Id. at 21.

B. The United States' Decision to Allow LPA's Former Workers to Receive their Earned, Taxed, but Unpaid Wages and LPA's Attorneys to be Paid for Their Work to Resolve LPA's Environmental Liability is Fair, Reasonable, and Consistent with CERCLA.

The Objectors' arguments regarding the United States' decision not to demand that LPA pay the United States before paying its former workers and attorneys, Dkt. 46 at 13-30, boil

down to whether it is fair and reasonable for the United States to, for equitable purposes, 1) treat LPA's former workers as workers rather than as traditional investors; 2) treat the Retains as earned, taxed, but unpaid wages; and 3) treat LPA's attorneys, who have remained unpaid while attempting to resolve LPA's environmental liability by maximizing the value of its assets, as priority creditors. As the United States argued in its Motion to Enter, there is no legal requirement to do otherwise, and the equities merit such treatment. The Arkema Settlement further enhances the fairness and reasonableness of the Amended Consent Decree by capturing for the benefit of all PRPs, and especially future performing parties, a substantial portion of the Retains and share redemptions LPA would otherwise have paid to its former workers.

1. LPA's Former Workers are Not Traditional Investors.

Notwithstanding Objectors' efforts to characterize them as "investors," , LPA's former workers are not traditional investors, if not actually at least for equitable purposes. First, even in the tax context, the tax treatment of cooperative workers' earnings is "based on the members' contribution in the form of work, not capital or entrepreneurial risk." Linnton Plywood Ass'n v. United States, 410 F. Supp. 1100, 1107 n.13 (D. Or. 1976) ("LPA Tax Case II"). Second, in a traditional marketing cooperative, where each worker individually produces the product but markets them collectively, there has never been any doubt that the workers are not traditional shareholders for tax purposes. See Linnton Plywood Ass'n v. United States, 236 F.Supp. 227, 228 (D. Or. 1964) ("LPA Tax Case I"). It would be "absurd" to treat workers of a manufacturing cooperative, where the products are produced collectively and marketed collectively, any differently. Id. Third, unlike traditional investors, whose equity is derived from the monetary contributions to capital and whose distributions of profits are based on such contributions, workers in a workers' cooperative contribute equity in the form of labor, and all of the fruits of

the cooperative based on that labor are distributed in accordance with it. Id.; Puget Sound Plywood, Inc. v. Commissioner of Internal Revenue, 44 T.C. 305, 309 (U.S. Tax Court, 1965); see also Linnton Plywood v. Tax Com., 241 Or. 1, 403 P.2d 708 (Or. 1965) (holding that patronage dividends are taxed to the worker because they reflect the workers' earnings, not the cooperative's profits.). Indeed, the earnings of a workers' cooperative "are not profits but rather savings produced for a patron through pooled effort." SAIF Corp v. Ekdahl, 170 Or. App. 193, 197, 12 P.3d 57, 59 (Or. App. 2000) (internal citation omitted). Thus, contrary to the Objectors' argument, the distribution of those earnings to the cooperative's patrons via dividends is totally unlike the distribution of a corporations profits to shareholders. It is, therefore, fair and reasonable for the United States to treat LPA's workers differently than it would treat traditional investors.

2. The Retains Represent Wages for Equitable Purposes, and Allowing LPA to Pay its Workers their Earned, Taxed, and Unpaid Wages is Fair, Reasonable, and Consistent with CERCLA.

Objectors do not dispute that the Retains comprise the sum of the credits each LPA worker earned, based on the number of hours they each worked, in each year. Contrary to their claims, Dkt. 46 at 7-10, the United States is not estopped from treating these unpaid credits, upon which LPA's workers have paid income tax, as wages for equitable purposes. Indeed, that is the only equitably fair way to treat them, as they represent compensation in exchange for hourly labor.

The Objectors misconstrue the LPA tax cases, LPA Tax Case I and LPA Tax Case II, on which they rely. In LPA Tax Case I, the United States unsuccessfully argued that retains could not be exempted from LPA's gross profits for tax purposes as patronage dividends. LPA Tax Case I, 236 F. Supp. at 228. In LPA Tax Case II, the government lost the argument that a

different plywood workers cooperative, Multnomah Plywood Corporation, could not, alternatively, treat retains as wages subject to the business expense deduction. LPA Tax Case II, 410 F. Supp. at 1107. As the court found, "although these two approaches are conceptually different, there is no significant difference in the total amount which may be deducted and excluded from earnings; the tax is substantially the same." Id. Thus, the United States' position that retained patronage credits can be considered as wages for at least some purposes is fully consistent with LPA Tax Case I and LPA Tax Case II.

It is, moreover, consistent with other tax cases involving patronage dividends. For example, as the Ninth Circuit has found, patronage dividends from a farmer's cooperative are subject to the self-employment tax. Shumaker v. C.I.R., 648 F.2d 1198, 1200 (9th Cir. 1981). Thus, however LPA characterized retained patronage credits for its own tax purposes, for the tax purposes of its workers, those retained credits were indeed wages subject to the self-employment tax.

Notwithstanding Objectors' citations to state law authorities, Oregon courts have held that patronage dividends from a workers' cooperative are "wages" for worker's compensation purposes. See SAIF Corp., 170 Or. App. at 197, 12 P.3d at 60. Indeed, as the Oregon Supreme Court had previously explained specifically with regard to LPA's patronage dividends, "the income produced by a cooperative through the efforts of its members is properly considered income of the members, rather than the profits of the cooperative." See id., citing Linnton Plywood, 241 Or. 1, 403 P.2d 708.

At the end of the day, the facts that LPA's workers labored, had payments for that labor retained by LPA, paid taxes on those retained payments notwithstanding never having received them, and are now in the position, long after the end of their working lives, of never being paid,

renders both fair and reasonable the United States' decision to allow LPA to finally pay them. Notwithstanding Objectors' arguments to the contrary, Dkt. 46 at 22-24, that decision is subject to "tremendous deference," United States v. Coeur d'Alenes Co., 767 F.3d 873, 879 (9th Cir. 2014).

Contrary to Objectors' claims, Dkt. 46 at 15, United States' decision not to squeeze every last drop from LPA, amounting to an average of less than $16,000 to each worker, is consistent with the emphasis in EPA's ability-to-pay policy on compassion for individuals.[6] United States v. Bay Area Battery, 895 F. Supp. 1524, 1527 (N.D. Fla. 1995). Objectors' effort to distinguish Bay Area Battery regarding the business preservation consideration of the ability to pay policy is similarly unavailing. There, the government chose not to demand so much that the defendant would be unable to carry on business to pay its creditors, id., whereas here, the government has chosen not to demand so much that the defendant is unable to pay its remaining creditors out of its remaining assets.

Finally, the Objectors' demand that LPA's workers should be required to forego some portion of the Retains and/or share redemptions has been satisfied by the Arkema Settlement. And, just as Objectors urged, the additional funds recovered by the Arkema Settlement will be devoted to future site cleanup if any PRP timely agrees to perform the ultimate remedy. Presumably, notwithstanding the Objectors' efforts to minimize them, Dkt. 46 at 17-18, the amount of the Arkema Settlement reflects the litigation risks identified in the United States' Motion to Enter. See Dkt. 33 at 26-27. To the extent Objectors contend that the United States

[6] It must be noted that, contrary to Objectors' mischaracterizations, e.g. Dkt. 46 at 23, the fact that the Amended Consent Decree allows LPA to pay its former workers their earned, taxed, but unpaid wages does not leave LPA "free and clear" of any liability. To the contrary, LPA will pay the United States $450,000, seed the Insurance Recovery Trust with $50,000, and assign rights under its insurance policies for Environmental Claims to the Insurance Recovery Trust for the benefit of the United States. Moreover, pursuant to the Arkema Settlement, LPA will contribute an additional $500,000 toward the performance of the remedy.

should receive still more of the money that would otherwise go to LPA's former workers, the Court should approve the Amended Consent Decree because it falls within the "range of reasonableness." Bay Area Battery, 895 F.Supp. at 1531.

3. Allowing LPA to Pay its Attorneys for Their Work in Resolving LPA's Environmental Liability and Maximizing the Value of LPA's Assets Is Fair, Reasonable, and Consistent with CERCLA.

Notwithstanding Objectors' claim, Dkt. 46 at 13, there is nothing "extraordinary" about the United States' view that allowing an ability-to-pay defendant to pay its attorneys for their work in resolving the defendants' environmental liability and in maximizing the value of the estate is in the public interest. And Objectors point to nothing in CERCLA that prohibits the United States from relying on the "unverified" statements of attorneys as to the purpose and amount of their legal fees. See Dkt. 46 at 12-13. Even if they could, LPA's representations regarding its attorneys' fees were in fact "verified" in that LPA has certified to the truth and accuracy of all of the financial information it has submitted, including those representations. See Amended Consent Decree ¶ 35. Moreover, the amount of LPA's obligations to its attorneys are set forth as a matter of record in the deeds of trust filed by those attorneys against LPA's property. See Ex. __. In any event, LPA has now further verified its representations regarding its unpaid attorneys fees via the declaration of LPA's counsel file simultaneously with this reply brief. See Dkt. ___.

To the extent that there remains any risk that LPA has submitted inaccurate or incomplete information, or that EPA's financial expert was misled by it, Dkt. 46 at 11-12, the Amended Consent Decree conditions both the United States' covenant not to sue and LPA's protection from contribution actions by other PRPs on LPA's truthfulness. See Amended Consent Decree, ¶ 16. As the Ninth Circuit found in affirming another ability-to-pay consent decree with similar

provisions, this means that LPA has "nothing apparent to gain by making any misrepresentations." Coeur d'Alenes Co., 767 F.3d at 873.

Ultimately, like the intervenor in that case, here the Objectors bear an "extraordinarily high burden" to demonstrate that the government's investigation of LPA's financial status was so defective as to require disapproval of the Amended Consent Decree. Id. Their suggestions that the record is confusing, Dkt. 46 at 12-13, 13-14, are not sufficient to carry that burden.[7]

4. The Objectors Remaining Arguments are Meritless.

The Objectors' remaining arguments all rely on their false claim that EPA "inexplicably failed to secure a lien against LPA's property." Dkt. 46 at 18-21. While Section 107(l) of CERCLA does permit EPA to place a lien on a PRP's property that is "subject to or affected by" a removal or remedial action, Dkt. 46 at 19 (citing 42 U.S.C. § 9607(l)), EPA interprets that to mean property owned by a PRP on which EPA has actually taken a response action. See Ex. 23 (EPA Guidance on Federal Superfund Liens, Sept. 22, 1987) at 1.[8] EPA has not taken a response action on LPA's property. Therefore, consistent with EPA's guidance on its Section 107(l) lien authority, EPA has not moved to place a Superfund lien on LPA's property.

Aside from being fully consistent with EPA's articulated policy, EPA's decision not to place a lien on LPA's property is, first and foremost a matter of enforcement discretion based on

[7] In any event, the Objectors' criticisms are easily met. For example, the claimed disparity between Mr. Oatis' statement that "LPA's unpaid bills as of August 31, 2011 totaled $847,700," and his conclusion in 2014 that LPA projected a $700,000 distribution to creditors (i.e., LPA's attorneys), Dkt. 46 at 12-13, is that the former figure included LPA's then-unpaid property taxes whereas the latter did not (and in the interim, LPA's unpaid legal bills had increased from $405,915.89 to approximately $700,000). Compare Ex. 24 (Sept. 6, 2011 "Liquidation Expense for Linnton") with Ex. 25 (Feb. 28, 2014 LPA Schedule of Estimated Property Sale Proceeds). In other words, the Objectors are inappropriately comparing apples to oranges. Likewise, while LPA could have shown the purchase price inclusive of the discount for cash-at closing, rather than exclusive of that discount, Dkt. 46 at 13-14, its approach is consistent with the structure of the purchase agreement and, as evidenced by the Objectors' explanation of the difference, not particularly unclear.

[8] To be clear, EPA's lien authority includes all portions of a PRP's property on which it has taken a response action, not just the particular portion of the property where the action was taken. Id.

site-specific facts, and in this case, reasonable. Taken to its logical conclusion, the Objectors' argument would mean that the property of every PRP within the boundaries of the Portland Harbor Superfund Site is already subject to an EPA Superfund lien (which will be senior to every later-filed lien upon its recordation). Surely the Objectors would not concede that their own property, or that of every other PRP, is subject to a Superfund lien merely because it has been arguably affected by EPA's response actions elsewhere at the Site.

Because EPA's decision not to record a Superfund lien against LPA's property is reasonable, the Court need not consider the Objectors' arguments regarding what standard of review to apply to a decision to subordinate a government lien to another creditor. See Dkt. 46 at 22-24. Indeed, to the extent Objectors suggest that the Amended Consent Decree is subject to any standard of review beyond whether it is "fair, reasonable, and consistent with CERCLA's objectives," they are flatly wrong. See United States v. Montrose Chem. Corp., 50 F.3d 741, 743, 747 (9th Cir. 1995) (citing United States v. Cannons Engineering Corp., 899 F.2d 79, 85 (1st Cir. 1990).

C. The United States Does Not Intend to Use the Amended Consent Decree as a Template for Future Settlements At the Site

Objectors have expressed the concern that EPA will use the Amended Consent Decree as a "model" for future settlements at the Site. See Dkt. 46 at 3. It is clear from additional discussions with the Objectors that the core of this concern relates to settlement negotiations the United States has been conducting (with the knowledge and consent of the Arkema Plaintiffs and the PCI Group) with another PRP at the Site, the DIL Trust, because DIL Trust has substantially greater insurance coverage than does LPA. However, as the United States has informed DIL

Trust, each of the Objectors, and the PCI Group via its identified representatives, negotiations with DIL Trust have ceased.

At this point, the United States does not intend to enter into a settlement with DIL Trust without ensuring that DIL Trust resolves PRP claims against it. Whether that resolution is in a separate settlement agreement or part of the same document, the United States intends to involve PRPs in negotiations with DIL Trust to ensure that DIL Trust's insurance assets provide maximum value for response actions at the Site. The United States anticipates working with the identified representatives of the PCI Group and the Arkema Plaintiffs to determine the best negotiating process and structure to achieve these goals and to avoid overly burdensome transaction costs for all parties. Further, the United States does not intend to entertain any other early settlements before the ROD is issued absent an extraordinary circumstance such as bankruptcy or imminent dissolution where assets might be wasted.

CONCLUSION

For the reasons set forth above and in the United States' Motion to Enter, the proposed Amended Consent Decree is fair, reasonable, and consistent with CERCLA. The United States therefore respectfully requests that the Court enter the Amended Consent Decree (Dkt. 33-1) by signing at page thirty-six thereof.

Respectfully submitted,

Dated June 16, 2015

/_____

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